Supreme Court, U. S.
FILED
MAR 10 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1396

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

v.

GREYHOUND COMPUTER CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

THOMAS D. BARR
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005

JAMES S. CAMPBELL
ALAN N. BRAVERMAN
ANDREW N. VOLLMER
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner International Business Machines Corporation

Of Counsel:

NICHOLAS DEB. KATZENBACH
International Business Machines Corporation
Armonk, New York 10504

BROWN & BAIN
222 N. Central Avenue
Phoenix, Arizona 85004

March 10, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING THE WRIT	9
I. This Petition Raises an Issue of Unusual Importance That Has Produced a Widespread Conflict of Views in the Lower Federal Courts.	9
II. The Question of Jury Trials in Complex Cases Should Be Considered by this Court with both the *U.S. Financial* Case and the Instant Case Before It.	13
III. The Ninth Circuit's View That the Complexity of a Case Is Irrelevant to Whether It Is Triable as of Right to a Jury Is Historically Wrong and Is Contrary to Established Constitutional Principles.	15
CONCLUSION	20
APPENDIX A	1a
APPENDIX B	2a

TABLE OF AUTHORITIES

Cases: Page

Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442 (1977) 19
Barker v. Wingo, 407 U.S. 514 (1972) 15
Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 18, 19
Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978) 11
In re Boise Cascade Securities Litigation, 420 F. Supp. 99 (W.D. Wash. 1976) 11
California Computer Products, Inc. v. IBM Corp., [1979-1] Trade Cas. ¶ 62,713 (9th Cir. June 21, 1979) 5
Cox v. C.H. Masland & Sons, Inc., 607 F.2d 138 (5th Cir. 1979) 12
Curtis v. Loether, 415 U.S. 189 (1974) 12, 13
Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) 18
Forro Precision, Inc. v. IBM Corp., Civ. No. 74-1653 (N.D. Cal. 1977), *appeal pending*, Nos. 78-1455, 78-1755 (9th Cir., docketed Mar. 1 and Apr. 7, 1978) 5
Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979) 16
Greyhound Computer Corp. v. IBM Corp., [1972] Trade Cas. ¶ 74,205 (D. Ariz. 1972), *rev'd in part*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) ..... *passim*
Hildebrand v. Board of Trustees, 607 F.2d 705 (6th Cir. 1979) 12
House v. Mayo, 324 U.S. 42 (1945) 2
Hyde Properties v. McCoy, 507 F.2d 301 (6th Cir. 1974) 12
ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *appeal pending sub nom. Memorex Corp. v. IBM Corp.*, Nos. 78-3050, 78-3236 (9th Cir., docketed Sept. 12 and Oct. 6, 1978) 5, 11, 14
Katchen v. Landy, 382 U.S. 323 (1966) 18
Mathews v. Eldridge, 424 U.S. 319 (1976) 16

TABLE OF AUTHORITIES—Continued

Page

Minnis v. International Union, UAW, 531 F.2d 850 (8th Cir. 1975) 12
Parklane Hosiery Co. v. Shore, 439 U.S. 322 (1979) 19
Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977), *aff'd on other grounds*, 434 U.S. 575 (1978) 12
Rogers v. Loether, 467 F.2d 1110 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189 (1974) 11, 12
Rosen v. Dick, 83 F.R.D. 540 (S.D.N.Y. 1979), *interlocutory appeal docketed*, No. 79-7844 (2d Cir., Nov. 27, 1979) 11
Ross v. Bernhard, 396 U.S. 531 (1970) 10, 11, 18, 19
In re 620 Church Street Building Corp., 299 U.S. 24 (1936) 2
Telex Corp. v. IBM Corp., 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd in part*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) 5
Tidewater Oil Co. v. United States, 409 U.S. 151 (1972) 2
Tights, Inc. v. Stanley, 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971) 12
Transamerica Computer Co. v. IBM Corp., [1979-2] Trade Cas. ¶ 62,989 (N.D. Cal. Oct. 18, 1979), *appeal docketed*, No. 80-4048 (9th Cir. Jan. 31, 1980) 5
Transamerica Computer Co. v. IBM Corp., 459 F. Supp. 626 (N.D. Cal. 1978) 11
United States v. Anderson, 584 F.2d 369 (10th Cir. 1978) 12
In re U.S. Financial Securities Litigation, 609 F.2d 411 (9th Cir. 1979) ..... *passim*
In re U.S. Financial Securities Litigation, 75 F.R.D. 702 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979) 8
Zenith Radio Corp. v. Matsushita Electric Industrial Co., 478 F. Supp. 889 (E.D. Pa. 1979), *appeal pending*, No. 79-2540 (3d Cir., argued Feb. 14, 1980) 11

TABLE OF AUTHORITIES—Continued

	Page
Constitutional Provisions:	
U.S. Const. amend. V	4, 6, 16
U.S. Const. amend. VII	*passim*
Statutes and Federal Rules:	
15 U.S.C. § 2 (1976)	4, 12
15 U.S.C. § 15 (1976)	4
28 U.S.C. § 1254(1) (1976)	2, 3
28 U.S.C. § 1292(b) (1976)	2, 3, 7
28 U.S.C. § 1651(a) (1976)	2, 3
Fed. R. Civ. P. 39(a)(2)	4, 6, 10
Miscellaneous Authorities:	
P. Devlin, *Note on the Suit at Common Law in England at the Time of the Seventh Amendment (1791)* (Dec. 1979)	17, 18
Moore's Federal Practice (2d ed. 1975)	2
C. Wright & A. Miller, *Federal Practice and Procedure* (1978)	2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

v.

GREYHOUND COMPUTER CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

International Business Machines Corporation ("IBM") petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order of the court of appeals (App. A) is not reported. The memorandum, order and certification of the district court (App. B) are not reported.

JURISDICTION

The order of the court of appeals denying IBM's petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) on the ground that the issue of law raised by the petition had been resolved by the Ninth Circuit in *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. Dec. 10, 1979), was entered on February 1, 1980. This Court has jurisdiction to issue the prayed-for writ under 28 U.S.C. § 1254(1) or 28 U.S.C. § 1651(a).[1]

QUESTION PRESENTED

Whether a federal district court has the authority under the Constitution to strike a jury demand in a case of such extraordinary complexity as to exceed the practical abilities and limitations of a jury.

---

[1] The fact that the court of appeals has considered the merits of the question presented in denying IBM's petition to appeal, *see* p. 8, *infra*, has "brought the case within any reasonable purpose of the requirement [of 28 U.S.C. § 1254(1)] that it be *in* that court." C. Wright & A. Miller, *Federal Practice and Procedure* § 4036, at 13 (1978) (emphasis added). This Court, therefore, has jurisdiction under Section 1254(1) to issue a writ of certiorari to the court of appeals. *See, e.g., Tidewater Oil Co. v. United States*, 409 U.S. 151 (1972). In the event this Court decides that this case was not "in" the court of appeals within the meaning of Section 1254(1), IBM moves in the alternative to invoke this Court's jurisdiction under 28 U.S.C. § 1651(a). *House v. Mayo*, 324 U.S. 42 (1945); *In re 620 Church St. Bldg. Corp.*, 299 U.S. 24 (1936); 9 *Moore's Federal Practice* ¶ 110.27, at 299 (2d ed. 1975). To that end, IBM has today filed a petition for a writ of certiorari under Section 1651(a) with an accompanying motion for leave to file.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 1254(1) (1976) provides:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ."

28 U.S.C. § 1292(b) (1976) provides:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

28 U.S.C. § 1651(a) (1976) provides:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The Fifth Amendment to the United States Constitution provides in relevant part:

> "No person shall be . . . deprived of . . . property, without due process of law . . . ."

The Seventh Amendment to the United States Constitution provides in relevant part:

> "In Suits at common law . . . the right of trial by jury shall be preserved . . . ."

Rule 39(a)(2) of the Federal Rules of Civil Procedure provides in relevant part:

> "When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless . . . the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

STATEMENT

This petition arises out of a ruling preceding the second trial of an action commenced by Greyhound Computer Corporation ("Greyhound") against IBM under Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), alleging violations of Section 2 of the Sherman Act, 15 U.S.C. § 2 (1976). Including the first trial in this case, the upcoming trial will be the seventh trial of a private Section 2 damage action against IBM, all arising out of the same general time period and all involving many similar claims, issues and facts. Three of these cases—*Memorex*, *Transamerica* and *Forro*—reached juries after lengthy

trials.[2] In all three, the juries hung on the antitrust issues.[3]

The first *Greyhound* trial was a protracted, complex proceeding. At issue were a variety of claims based on IBM's products and pricing and involving complicated concepts of accounting, finance, market economics and computer technology. Plaintiff's case required 25 trial days. Two hundred sixty-nine exhibits were introduced into evidence, and 20 witnesses testified. The trial transcript ran to some 4,100 pages. At the close of plaintiff's case, the trial judge directed a verdict for IBM. [1972] Trade Cas. ¶ 74,205 (D. Ariz. 1972). The judgment for IBM was subsequently reversed in part and remanded for a new trial of most of the Section 2 claims. 559 F.2d

---

[2] Two of the actions, including the first *Greyhound* trial, resulted in a directed verdict at the close of plaintiff's case. *California Computer Products, Inc. v. IBM Corp.*, [1979-1] Trade Cas. ¶ 62,713 (9th Cir. June 21, 1979) (58 trial days) (directed verdict affirmed). The one bench trial was *Telex Corp. v. IBM Corp.*, 367 F. Supp. 258 (N.D. Okla. 1973), *rev'd in part*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). The antitrust claims in *Telex* were tried together with a trade secret counterclaim in 30 days. The district court decided against IBM on the antitrust claim and for IBM on the trade secret claim. The Tenth Circuit reversed the antitrust decision and directed the entry of judgment for IBM; it affirmed the judgment for IBM on the trade secret claim.

[3] *ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978), *appeal pending sub nom. Memorex Corp. v. IBM Corp.*, Nos. 78-3050, 78-3236 (9th Cir., docketed Sept. 12 and Oct. 6, 1978) (*"Memorex"*) (96 trial days); *Transamerica Computer Co. v. IBM Corp.*, [1979-2] Trade Cas. ¶ 62,689 (N.D. Cal. Oct. 18, 1979), *appeal docketed*, No. 80-4048 (9th Cir. Jan. 31, 1980) (123 days); *Forro Precision, Inc. v. IBM Corp.*, Civ. No. 74-1653 (N.D. Cal. 1977), *appeal pending*, Nos. 78-1455, 78-1755 (9th Cir., docketed Mar. 1 and Apr. 7, 1978) (22 trial days).

488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). The second trial is now scheduled to begin on May 1, 1980.

The second *Greyhound* trial will almost certainly involve even more complex issues than the first. All but two of the issues presented in the first trial are again to be contested. In addition, Greyhound is pressing new claims based on IBM's products and pricing since 1972 and now alleges anticompetitive conduct in dozens of markets and submarkets—not just the two or three at issue in the first trial. The case also now covers an additional seven years of allegedly anticompetitive conduct.[4] The district court judge has concluded that this is a "complex case by any definition." App. B. He has estimated conservatively that it will take as long as four months to try Greyhound's claims to a jury. *Id.*

Because a jury cannot reasonably be expected to understand and fairly decide so protracted and complex a case—as the *Memorex*, *Transamerica* and *Forro* cases have vividly demonstrated—IBM moved, pursuant to Fed. R. Civ. P. 39(a), to strike Greyhound's jury trial demand. IBM argued, first, that the Seventh Amendment does not preserve a right to a jury trial in cases too complicated to be understood by a jury and, second, that the Due Process Clause does not permit the use in the federal courts of an

[4] The greatly expanded scope and complexity of the second trial is reflected in the extensiveness of Greyhound's pre-trial discovery. Greyhound has deposed 73 IBM employees—over 5 times the number of IBM employee depositions taken in preparation for the first trial. And IBM has this time produced well over 10 times the approximately 150,000 pages of documents discovered by Greyhound for the first trial.

adjudicatory procedure incapable of yielding a reasoned result.

The district court agreed that the *Greyhound* case "involves sophisticated, highly technical and difficult questions of economics, technology and law" and acknowledged "the real danger of a hung jury." App. B. Nevertheless, the district court concluded that under its view of the "current status of the law," *id.*, it lacked the authority to grant IBM's motion to strike. At the same time, the court acknowledged that the lower courts are "not unanimous" on the issue raised by IBM's motion, and it therefore certified the question of jury trials in complex cases to the Ninth Circuit pursuant to 28 U.S.C. § 1292(b). *Id.*

While IBM's petition for permission to appeal was pending, the Ninth Circuit announced its decision in *In re U.S. Financial Securities Litigation*, 609 F.2d 411 (9th Cir. Dec. 10, 1979). That case involved an appeal from an order entered by the trial judge striking a plaintiff's jury trial demand on the ground that the case was too complex to be understood by the jury. In reversing the trial judge, the Ninth Circuit, one judge dissenting, held there is no "'complexity' exception to the Seventh Amendment right to a jury trial in civil cases." *Id.* at 413. The majority reasoned that the Seventh Amendment preserves a right to a jury in a damage action asserting traditional common law claims, regardless of the complexity of the issues involved or their suitability for resolution through the jury procedure. The majority also rejected a due process challenge to the use of juries in complex cases, basing its decision on its

belief that complexity can be minimized through various pre-trial and trial procedures and that, regardless of the ultimate complexity of the issues, "a jury *is* a competent fact finder in complex cases." *Id.* at 427 (emphasis in original).

In reaching this result, the *U.S. Financial* majority made clear that its decision did not turn on the degree of complexity involved in the *U.S. Financial* trial. Indeed, the majority opinion declared that "differing degrees of difficulty and complexity would not alter [its] ultimate decision." *Id.* at 416. In dissent, Judge Kilkenny observed that a jury trial of the complicated issues involved in the *U.S. Financial* case "would result in nothing short of judicial chaos" and that the opinion of Judge Turrentine, the trial judge, " 'covers the waterfront' and adequately responds to every proposal of the majority. *In re U.S. Financial Securities Litigation*, 75 F.R.D. 702 (1977)." *Id.* at 432.

By an order entered on February 1, 1980, the Ninth Circuit, per Judges Hug and Pregerson, rejected IBM's petition for permission to appeal. In so doing, the court made clear that it had considered the merits of the IBM petition and had found the certified question to be controlled by its recent pronouncements in *U.S. Financial.* The court ruled: "The issue of law raised by the petition has been definitively resolved in this circuit, *In re United States Financial Securities Litigation* . . . ." App. A.[5]

---

[5] A petition for a writ of certiorari to review the *In re U.S. Financial Securities Litigation* decision has been filed with the Court and is captioned *Gant v. Union Bank.* IBM has moved for leave to file a brief as amicus curiae in support of petitioner Gant.

REASONS FOR GRANTING THE WRIT

This case raises an issue of unusual importance for the administration of justice in the federal courts. The question presented is whether the Constitution denies a federal district court judge the power to withhold a civil case from a jury and decide it himself when the judge is convinced that a jury cannot reasonably be expected to understand and accurately decide the extraordinarily complex issues involved. Relying on its recent decision in *U.S. Financial,* the Ninth Circuit has ruled that the extraordinary complexity of the upcoming second *Greyhound* trial cannot serve as a basis for striking plaintiff Greyhound's jury trial demand. The Ninth Circuit's decisions in both the instant case and in *U.S. Financial* are wrong, inconsistent with the teachings of this Court, and in conflict with the decisions of other federal courts concerning the standards to be applied in resolving Seventh Amendment jury trial questions. Unless reversed, the Ninth Circuit's ruling will perpetuate the increasing abuse of jury trial procedures that has resulted in avoidable burdens on the federal courts and in litigants being deprived of fair and reasoned adjudications of complex disputes.

I. This Petition Raises an Issue of Unusual Importance That Has Produced a Widespread Conflict of Views in the Lower Federal Courts.

There can be no serious question about the importance of the issue raised by this petition. At issue here is the adequacy of the jury trial procedure to reach fair and reasoned results in extraordinarily complex cases. Whether jury trial is a constitutionally mandated procedure in cases of such extraordinary

complexity as to exceed the practical abilities and limitations of juries is, as the Ninth Circuit so aptly observed, a question that "strikes at the heart of this country's system of jurisprudence." 609 F.2d at 413.

The Ninth Circuit's rulings in *Greyhound* and *U.S. Financial* have heightened the already widespread conflict among the federal courts concerning the standards to be applied in resolving Seventh Amendment jury trial questions. The Ninth Circuit is, to be sure, the first court of appeals to decide squarely whether the complexity of a lawsuit is of itself a constitutionally sufficient basis to strike a jury demand. The Ninth Circuit's rulings are, however, in direct conflict with at least four district court opinions. And the Ninth Circuit's refusal to allow trial courts to consider the complexity of a case, in ruling on a motion under Fed. R. Civ. P. 39(a)(2) to strike a jury demand, is directly contrary to the approach to Seventh Amendment questions that has been adopted by six other courts of appeals.

In concluding that the ability of a jury to comprehend a case of extraordinary complexity is not relevant to Seventh Amendment analysis, the Ninth Circuit refused to follow the test set forth in *Ross v. Bernhard*, 396 U.S. 531, 538 (1970). In *Ross*, this Court identified three factors to be used in determining whether the Seventh Amendment preserves a right to jury trial of a particular claim: "As our cases indicate, the 'legal' nature of an issue is determined by considering first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, *the practical abilities and limitations of juries.*" *Id.* at 538 n.10 (emphasis added).

Reasoning that the third factor of the *Ross* test is a "radical departure" that does not state "a rule of constitutional dimensions," the Ninth Circuit declined the "invitation" to engage in the inquiry called for by *Ross*. 609 F.2d at 425.

The Ninth Circuit's decision cannot be reconciled with four district court opinions that have found the third factor of the *Ross* test dispositive of the question of the right to jury trial in extraordinarily complex cases. *Rosen v. Dick*, 83 F.R.D. 540 (S.D. N.Y. 1979), *interlocutory appeal docketed*, No. 79-7844 (2d Cir. Nov. 27, 1979); *Bernstein v. Universal Pictures, Inc.*, 79 F.R.D. 59 (S.D.N.Y. 1978); *ILC Peripherals Leasing Corp. v. IBM Corp.*, *supra*; *In re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (W.D. Wash. 1976).[6]

Nor can the Ninth Circuit's holding that the Seventh Amendment does not require an inquiry into "the practical abilities and limitations of a jury" be reconciled with the approach to Seventh Amendment questions that has been adopted by other courts of appeals. In *Rogers v. Loether*, 476 F.2d 1110 (7th Cir. 1972), *aff'd sub nom. Curtis v. Loether*, 415 U.S. 189 (1974), for example, the court, speaking through then Circuit Judge Stevens, described the *Ross* opinion as follows:

> "[T]he Court identified history as only one of three criteria that should be considered in de-

[6] Two district court opinions support the Ninth Circuit's result. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 478 F. Supp. 889 (E.D. Pa. 1979), *appeal pending*, No. 79-2540 (3d Cir., argued Feb. 14, 1980); *Transamerica Computer Co. v. IBM Corp.*, 459 F. Supp. 626, 629 (N.D. Cal. 1978).

> termining the 'legal' nature of an issue. The other two were: 'second, the remedy sought; and, third, the practical abilities and limitations of juries.' Indeed, not only did the Court identify these two additional criteria; it also implied, without expressly stating, that history may be a less reliable guide than the other two." *Id.* at 1118 (footnotes omitted).

A similar view of the *Ross* test has been adopted by other courts of appeals that have conducted a "complexity" inquiry into relatively non-complex lawsuits in the course of upholding (or, in one case,[7] in denying) a jury trial. *Cox v. C.H. Masland & Sons, Inc.*, 607 F.2d 138, 143 (5th Cir. 1979); *United States v. Anderson*, 584 F.2d 369, 373 (10th Cir. 1978); *Pons v. Lorillard*, 549 F.2d 950, 953 (4th Cir. 1977), *aff'd on other grounds*, 434 U.S. 575 (1978); *Minnis v. International Union, UAW*, 531 F.2d 850, 852 (8th Cir. 1975). *But see Tights, Inc. v. Stanley*, 441 F.2d 336 (4th Cir.), *cert. denied*, 404 U.S. 852 (1971).

The conflict created by the Ninth Circuit's rulings constitutes a sufficient basis for granting review. In *Curtis v. Loether*, 415 U.S. 189 (1974), this Court granted certiorari to review a Seventh Amendment issue that arose in the context of a remarkably similar split of authority. At issue in *Curtis* was whether the Seventh Amendment entitles a party to demand a jury trial to redress violations of Title VIII of the Civil Rights Act. The Court granted certiorari

---

[7] *Hyde Properties v. McCoy*, 507 F.2d 301, 306 (6th Cir. 1974). *See also Hildebrand v. Board of Trustees*, 607 F.2d 705, 708 n.3 (6th Cir. 1979).

"[i]n view of the importance of the jury trial issue in the administration and enforcement of Title VIII and the diversity of views in the lower courts on the question." *Id.* at 191. That "diversity of views," the Court went on to explain, consisted of the court of appeals opinion and a split of authority among the four district courts (including the district court in *Curtis*) that had addressed the issue: "The Seventh Circuit here was the first court of appeals to consider the issue, but the reported decisions of the district courts are evenly divided on the question." *Id.* at 191 n.2. The instant petition involves a jury trial question of at least equal importance and arises in the context of an even more widespread conflict among the courts.

II. The Question of Jury Trials in Complex Cases Should Be Considered by this Court with both the *U.S. Financial* Case and the Instant Case Before It.

While the Ninth Circuit applied the same misconceived constitutional analysis to the jury trial question in both *Greyhound* and *U.S. Financial*, the two cases present instructively different variations on the theme of extraordinary complexity. The complexity of *U.S. Financial* is, at least to some degree, a by-product of the joinder of many parties and the consolidation of many claims into one proceeding. *Greyhound*, in contrast, is basically a single dispute between two parties. The complicated nature of the suit arises solely out of the extraordinary complexity of the factual and legal issues involved. As the district court found, based on the record made in the pretrial proceedings and in the first trial, *Greyhound* presents "sophisticated, highly technical and difficult questions of economics, technology and law." App. B.

The district court's conclusion as to the substantive complexity of *Greyhound* is buttressed by IBM's experience in other Section 2 cases brought against it. The *Memorex* case, for example, raised Section 2 claims of marked similarity to those here involved. The trial lasted 96 days and involved 83 witnesses, including 17 experts, and 2,300 exhibits. After 19 fruitless days of jury deliberations, following instructions from the judge running to 83 pages, the *Memorex* foreman confessed the jury's inadequacy to the task they had been assigned, stating:

> "If you could find a jury that's both a computer technician, a lawyer, an economist, knows all that stuff, yes, I think you could have a qualified jury, but we don't know anything about that." [8]

The jury that heard the *Memorex* case, though "conscientious and diligent," 458 F. Supp. at 447, obviously did not understand the issues, as the trial judge found.[9] *Id.* at 448.

This Court should have before it the different kinds of complexity presented by *Greyhound* and *U.S. Financial* when it considers the applicability of the Seventh Amendment to extraordinarily complex litigation. The variations presented by the two cases will assist the Court in analyzing the constitutional

---

[8] *Memorex*, 104 Tr. 19,547-48.

[9] A more extended account of the *Memorex* jury's failure to understand that case is contained in Appendix A to IBM's amicus brief in support of the petition for certiorari filed in the *U.S. Financial* case. *See* note 5 *supra*.

issues in the concrete factual context of two major pieces of litigation under the antitrust and securities laws. Moreover, should the Court wish to enunciate standards to guide trial courts in the exercise of their authority to withhold extraordinarily complex cases from juries, *cf. Barker v. Wingo*, 407 U.S. 514 (1972), having both *Greyhound* and *U.S. Financial* before it would aid the Court in formulating generally applicable standards. Such standards should, of course, be based upon the principal factors that cause certain kinds of cases to exceed the practical abilities and limitations of juries. Taken together, the *Greyhound* and *U.S. Financial* proceedings provide a broader basis for identifying those factors than *U.S. Financial* does by itself.

III. The Ninth Circuit's View That the Complexity of a Case Is Irrelevant to Whether It Is Triable as of Right to a Jury Is Historically Wrong and Is Contrary to Established Constitutional Principles.

In *U.S. Financial*, the Ninth Circuit concluded that the extraordinary complexity of a case can never serve as a basis for striking a jury trial demand. In so concluding, the court has effectively deprived many litigants in the Ninth Circuit of their right to a fair and reasoned adjudication of disputes in extraordinarily complex cases. The court offered three justifications in support of this far-reaching determination. Each, we submit, is without foundation.

(1) The Ninth Circuit concluded that the trial of extraordinarily complex issues to a jury does not violate the right to due process under the Fifth Amendment. In reaching this decision, the court did not—

and indeed could not—dispute the contention that a litigant has a due process right to a decisionmaking procedure that will promote accurate decisions. Just last term, in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), this Court reaffirmed the principle that the Due Process Clause requires, *inter alia*, consideration of "the risk of an erroneous deprivation of [a private] . . . interest through the procedures used." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). The accuracy that due process is intended to promote can be reliably achieved in an adjudicatory proceeding only if decisions are based on an understanding of the evidence and applicable law. A jury that is not capable of understanding the issues involved in a lawsuit is manifestly unsuited to perform such a decisionmaking role.

The Ninth Circuit based its due process ruling on a generalized, unsubstantiated assumption that juries are capable of comprehending and fairly resolving all cases, however complex the issues or protracted the trial. Without analysis, the court declared that "experience demonstrates that juries are capable of sorting out complex factual issues and applying the law to them." 609 F.2d at 431. That unsupported conclusion is belied by IBM's experience in litigating, in the Ninth Circuit, complex issues such as those involved in *Greyhound* and does not constitute an adequate inquiry into the due process questions raised by use of the jury trial procedure in this case.

(2) The Ninth Circuit reasoned that the appropriate mode of Seventh Amendment analysis is the

"historical test"—a mode of analysis, traditionally applied by the federal courts, that examines the scope of common law jurisdiction at the time of the adoption of the Seventh Amendment in 1791. The court concluded that a case, however complex, must be deemed to be "a suit at common law"—and hence covered by the Seventh Amendment—if the claim is based on common law principles and damages are being sought. 609 F.2d at 421. That historical analysis is simply incorrect.

Historically, issues as complex as those involved in the *Greyhound* case would have been tried in equity to a court, not "at law" to a jury. A research Note prepared at the request of IBM's counsel by the Right Honorable Lord Devlin, a Lord of Appeal of England and a leading authority on the role of the jury in English law, decisively refutes the Ninth Circuit's conclusion that equity would not assume jurisdiction over a complex claim for damages founded on common law principles.

Equity took jurisdiction of a case, even a case pending in a law court, whenever the procedures of the law court were deemed to be inadequate and the law court was being made an instrument of injustice. As Lord Devlin shows, one reason that a law court might be procedurally inadequate, and thus fail to do justice, was its reliance on the jury to decide disputed questions of fact. The Chancellor, desiring to avoid injustice, did not permit litigants to submit to the common law courts complex cases unsuited to jury trial procedures. After tracing the various ways in which the Chancellor controlled the disposition of complex cases or issues, Lord Devlin concludes:

> "The cases, read as a whole, show that the Chancellors of the period had formed a very clear idea of what the juries of the period could and could not do adequately; and that they would not have allowed to proceed at common law any case which they considered to be above the level of the jury of the time." [10]

(3) The Ninth Circuit committed a fundamental error in concluding that this Court's reference in *Ross* to the "practical abilities and limitations of juries" was "a radical departure" from established Seventh Amendment doctrine. 609 F.2d at 425. Rather, that reference was merely a reformulation of a well established equitable doctrine that has been incorporated by this Court into Seventh Amendment analysis—equity must act when legal remedies or procedures are inadequate.

In a line of cases, beginning with *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959), this Court has increasingly defined the scope of the Seventh Amendment by making adequacy of legal remedy—specifically adequacy of jury trial procedures—the dividing line between what must be tried "at law" to a jury and what may be tried in equity to the court. *See also Katchen v. Landy*, 382 U.S. 323 (1966); *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962). By considering the adequacy or practicality of trying the claim or issue "at law" to a jury, this Court has been able to apply the Amendment functionally to

[10] P. Devlin, *Note on the Suit at Common Law in England at the Time of the Seventh Amendment (1791)* ¶ 105 (Dec. 1979). Lord Devlin's Note, currently available as a privately published monograph, has been accepted for publication in a forthcoming issue of the Columbia Law Review.

preserve the jury trial right in cases where that mode of trial is feasible and, at the same time, to remove from jury resolution those cases or issues in which a jury trial would not contribute to "a fair and orderly adjudication of the controversy." *Beacon Theatres, Inc. v. Westover*, 359 U.S. at 507.[11]

This mode of Seventh Amendment analysis was merely given its most explicit statement in *Ross v. Bernhard*, and the reference in *Ross* to "the practical abilities and limitations of juries" simply reflects what prior Seventh Amendment decisions and historical English practice make clear: The capacity of a jury to decide a case is a factor that must be considered by a trial court, and may in some cases prove determinative, in deciding whether the case is triable as of right to a jury.

[11] See *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, 430 U.S. 442 (1977), where this Court held that Congress could commit enforcement of statutory penal damage provisions to an administrative agency "in which facts are not found by juries," *id.* at 460, when Congress concluded that the "remedies available in courts of law were inadequate," *id.*, because a jury would be inconsistent with "speedy and expert resolutions of the issues involved." *Id.* at 461. *See also Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (judicial economy promoted by discerning use of non-mutual offensive collateral estoppel to avoid need for jury retrial of issues previously litigated in non-jury proceeding).

CONCLUSION

This case raises an issue of unusual importance for the administration of justice in the federal courts. The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS D. BARR
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005

JAMES S. CAMPBELL
ALAN N. BRAVERMAN
ANDREW N. VOLLMER
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner
International Business
Machines Corporation

Of Counsel:

NICHOLAS DEB. KATZENBACH
International Business
Machines Corporation
Armonk, New York 10504

BROWN & BAIN
222 N. Central Avenue
Phoenix, Arizona 85004

March 10, 1980

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 79-8301

D.C. No. Civ. 72-242 WPC Arizona (Phoenix)

GREYHOUND COMPUTER CORPORATION,
Plaintiff/Respondent,

v.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant/Petitioner.

ORDER

Before: HUG and PREGERSON, Circuit Judges

Upon due consideration, the court issues the following order:

(a) Pillsbury, Madison & Sutro's motion for leave to file an amicus curiae brief is granted;

(b) respondent's motion for reassignment of panel is denied; and

(c) the petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) is denied.

The issue of law raised by the petition has been definitively resolved in this circuit, *In re United States Financial Securities Litigation*, slip op. at 1186 (9th Cir. December 10, 1979).

Filed Feb. 1, 1980

RICHARD H. DEANE
Clerk,
U.S. Court of Appeals

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 72-242 Phx. WPC

GREYHOUND COMPUTER CORPORATION,
Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant.

MEMORANDUM AND ORDER AND CERTIFICATE

This complex case is set February 5, 1980 [now May 1, 1980], for retrial which the Court estimates will take a minimum of three months and probably more like four if tried to a jury as demanded by plaintiff. Defendant has moved to strike the jury demand so that the case may be tried to the Court. Plaintiff opposes.

This is an antitrust case involving sophisticated, highly technical and difficult questions of economics, technology and law. It is a complex case by any definition. Trial to the Court would substantially shorten the trial and avoid the very real danger of a hung jury and a third trial or more.

While the Court believes the current status of the law requires this Court to deny the motion to strike the jury, this view is not unanimous. *See Zenith*

Radio Corp. v. Matsushita Electric Ind. Co., Ltd., [1979-2] Trade Cases (CCH), ¶ 62,753 (E.D. Pa. June 6, 1979), and ¶ 62,893 (E.D. Pa. August 21, 1979). The Court is informed that the question is currently before the Ninth Circuit. *See In re U.S. Financial Securities Litigation* M.D.L. No. 161 (9th Cir. petition for review granted August 29, 1977), *appealing* 76 F.R.D. 702 (S.D. Cal. 1977).

IT IS ORDERED:

The motion to strike the jury demand is denied for lack of authority to grant said motion.

CERTIFICATE

Pursuant to 28 U.S.C. § 1292(b), this Court certifies that the question as to whether this Court has the authority to strike the jury demand in a case such as this involves a controlling question of law as to which there is substantial ground for difference of opinion with respect to that question and immediate appeal may materially advance the ultimate termination of the litigation. *See* Judge Becker's opinion in *Zenith Radio Corp. v. Matsushita Electric Ind. Co., Ltd.*, [1979-2] Trade Cases (CCH), ¶ 62,893 (E.D. Pa.), dated August 21, 1979.

DATED November 6, 1979.

/s/ Wm. P. Copple
United States District Judge

Supreme Court, U.S.
FILED
MAR 26 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1396

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

vs.

GREYHOUND COMPUTER CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EDWARD L. FOOTE
EDWARD J. WENDROW
One First National Plaza
Chicago, Illinois 60603
Counsel for Respondent, Greyhound Computer Corporation

Of Counsel:
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX

	PAGE
Questions Presented	1
Statement	2
Reasons for Denying the Petition	4
1. The Petition Should Be Denied Because IBM Had Waived Its Claim to a Non-jury Trial	4
2. The Petition Should Be Denied Because IBM's "Question Presented" Does Not Present a Question of Law, That was Passed Upon Either by the District Court or the Court of Appeals, but a Question of Law, Intermingled with a Question of Fact, Which Cannot Be Determined from the Record in the Court of Appeals	6
3. The Petition Should Be Denied Also Because the Decision of the Court of Appeals Was Correct and Is Not in Conflict with Decisions of Any Other Court of Appeals or of This Court	7
4. The Petition Should Be Denied Because This Case Is Not in Fact so Extraordinarily Complex as to Exceed the Practical Abilities and Limitations of a Jury	9
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Beacon Theatres, Inc. v. Westover, 359 U. S. 500 (1959) 9
In re Boise Cascade Securities Litigation, 420 F. Supp. 99 (D. C. Wash. 1976) 9
Curtis v. Loether, 415 U. S. 189 (1974) 8
Dairy Queen, Inc. v. Wood, 369 U. S. 469 9
Greyhound Computer v. IBM, 559 F. 2d 488 .....2, 11
In re U. S. Financial Securities Litigation, 609 F. 2d 411 (C. A. 9, Dec. 10, 1979) 3, 4, 8, 9
Fleitmann v. Welsbach Street Lighting Co., 240 U. S. 27 (1916) 8
Link v. Mercedes-Benz of North America, Inc., 550 F. 2d 860, 863 (C. A. 3, 1977), *cert. den.* 431 U. S. 933 6
Ross v. Bernhard, 396 U. S. 531 (1970) 4, 7

Constitutional Provisions:

U. S. Const. amend. VII 1, 6

Statutes and Federal Rules:

28 U. S. C. § 1292(b) 2, 3
F. R. C. P. 38 5
F. R. A. P. 5 4

Miscellaneous Authorities:

Manual for Complex Litigation, §§ 4.12, 4.40, 4.401, 4.41 10
Stern & Gressman, *Supreme Court Practice*, 4th ed. (1969), p. 314 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1396

INTERNATIONAL BUSINESS MACHINES CORPORATION,

Petitioner,

vs.

GREYHOUND COMPUTER CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MAY IT PLEASE THE COURT:

QUESTIONS PRESENTED

1. Has petitioner waived its claimed right to a non-jury trial by not asserting it until after ten years after this action was filed and after a directed verdict in a jury trial was reversed and remanded for trial by the Court of Appeals?

2. Is "complexity" of the issues in an antitrust treble damage action grounds for denying a right to a jury trial, notwithstanding the Seventh Amendment to the Constitution?

3. If question 2 be answered in the affirmative, is this case so "extraordinarily complex" as "to exceed the practical abilities and limitations of a jury"?*

STATEMENT

Respondent Greyhound disagrees with the "Question Presented" in IBM's petition for reasons which are evident by an additional Statement.**

This antitrust damage action was filed in an Illinois state court on October 28, 1969. It was later removed to an Illinois federal court. Another action, filed on September 4, 1970, in an Illinois federal court, was consolidated with it. After pretrial proceedings in Minnesota, it was transferred to the Arizona District Court on May 18, 1972. Trial began on May 23, 1972. At all times there was a jury demand by Greyhound. The District Court, at the close of Greyhound's case, directed a verdict for IBM. Greyhound appealed on July 14, 1972. On August 17, 1977, the Court of Appeals held that a jury could reasonably find, that IBM, by various trade practices, had violated § 2 of the Sherman Act by monopolizing, and attempting to monopolize, the leasing of general purpose commercial computers. (559 F. 2d 488, cert. den. 434 U. S. 1040.)

After remand, Greyhound filed an amended pleading, making its complaints against IBM more current. It was not *until 1979* that IBM, for the first time, contended that Greyhound was not entitled to a jury trial under the Seventh Amendment because of the alleged "complexity" of the case.

* Respondent has the right to urge in "Questions Presented" any argument in support of the judgment in its favor, including contentions not passed on by the court below (Stern & Gressman, *Supreme Court Practice,* 4th ed. (1969), p. 314).

** This additional Statement, like IBM's statement, will refer to facts not contained in the Court of Appeals record, in view of the limited nature of that record, resulting from its denial of permission to appeal under 28 U. S. C. § 1292(b).

On November 6, 1979, the district judge, who was a different judge from the one who tried the case the first time, wrote an opinion in which he characterized this case as "complex" and said trial to the Court would substantially shorten it and avoid the danger of a hung jury, but was of the view that he had no authority to strike the jury demand. He entered an order denying the motion to strike the jury demand "for lack of authority to grant such motion." (App. B to Pet.)

Pursuant to 28 U. S. C. § 1292(b), the Court certified the question whether it had authority to strike the jury demand as involving a controlling question of law. Thereafter, IBM filed a petition for permission to appeal; Greyhound answered. While the petition was pending, the Court of Appeals decided *In re U. S. Financial Securities Litigation,* 609 F. 2d 411 (C. A. 9, Dec. 10, 1979).* There, in very complex securities litigation, the ninth circuit held that there was no "complexity" exception to the Seventh Amendment right to a jury trial in civil cases and reversed an order of the District Court striking demands for a jury trial.

In this case, the Court of Appeals on February 1, 1980, denied IBM's petition for permission to appeal, citing the foregoing decision, and stating: "the issue of law raised by the petition has been definitively resolved in this circuit." (Pet. App. A) Because of the nature of its ruling the Court of Appeals found it unnecessary to pass upon other issues raised by Greyhound's answer, which are included in the Questions Presented above.

Although the petition states that the question presented is whether the Federal District Court has authority under the Constitution to strike a jury demand "in a case of such extraordinary complexity as to exceed the practical abilities and limitations of a jury", the District Court did not certify such a question, and the Court of Appeals, in denying the petition,

* A certiorari petition to review the Court's decision has been filed under the name of *Gant* v. *Union Bank,* Docket No. 79-1383.

did not decide it. When the Court of Appeals held that there was no complexity exception to the right to jury trial under the Seventh Amendment, this made it unnecessary to determine whether this case was in fact "too complicated" for a jury to understand—assuming such question was before it.*

The only record that the Court of Appeals had was the District Court's Order and certification, IBM's petition and Greyhound's answer. Under Rule 5 of the Federal Rules of Appellate Procedure, the record of the District Court is transmitted, and the appeal docketed, only when permission to appeal is granted. Consequently, it would not be possible for this Court to determine, even if it granted the writ, whether this case was in fact too complicated for a jury to understand unless it took judicial notice of the Court of Appeals opinion reversing the directed verdict, and assumed that additional issues raised by the amended complaint would not materially affect the "complexity" of the case.

REASONS FOR DENYING THE PETITION

1.

The Petition Should Be Denied Because IBM Had Waived Its Claim to a Non-Jury Trial.

It was not until after this case had been to the Court of Appeals, which reversed and remanded a directed verdict for IBM, and ten years after the action was filed, that IBM, for the first time, contended that this case was too complicated for a jury. IBM relies primarily on a footnote in *Ross* v. *Bernhard*, 396 U. S. 531, decided by this Court in 1970. Under the chronology of events given, this case had been decided two years before the present case went to trial. IBM at no time questioned the propriety of a jury trial, either in the District Court at the first trial, or in the Court of Appeals on Greyhound's appeal.

* The finding of the District Court in this case is not the same as the one made in the *U. S. Financial* case. There the District Court found "that the legal and factual issues were of such complexity as to be beyond the practical abilities and limitations of a jury." 609 F. 2d at p. 413.

Rule 38 *F. R. C. P.* requires that a jury demand be filed not later than ten days after the service of the last pleading directed to an issue triable by a jury, otherwise there is a waiver. It would be most anomalous to hold, that although a party to a jury trial must assert it within a specified time or waive his constitutional right, that a party who claims a constitutional right* to a non-jury trial can wait until more than ten years after the action has been filed, and after the case was tried to a jury but a directed verdict reversed by the Court of Appeals, to assert his claim for the first time.

This is a particularly appropriate case to deny the petition because of a waiver. IBM's assertion of a right to a non-jury trial is a transparent effort to sidestep the adverse holding of the ninth circuit. Under the "law of the case" rule, there will be jury issues as to whether IBM violated § 2 of the Sherman Act if the evidence on retrial is substantially the same. But if IBM succeeds in its present petition, it will attempt to avoid its defeat in the Court of Appeals by contending in the District Court that it, as the trier of fact, has a right to find the facts, unhampered by the views of the Court of Appeals as to what a jury reasonably could find.

* IBM claims a denial of due process if it is not granted a non-jury trial. (Pet., 15, 16)

2.

The Petition Should Be Denied Because IBM's "Question Presented" Does Not Present a Question of Law, That Was Passed Upon Either by the District Court or the Court of Appeals, but a Question of Law, Intermingled with a Question of Fact, Which Cannot Be Determined from the Record in the Court of Appeals.

IBM states that the question presented is whether the federal court has authority under the Constitution to strike a jury demand "in a case of such extraordinary complexity as to exceed the practical abilities and limitations of a jury." The District Court, although it found this was a "complex case," never found that it was so complex as to exceed the practical abilities and limitations of a jury.

The answer to the question presented by IBM involves both one of law and one of fact. The question of law presented is whether there is a "complexity" exception to the right to a trial by jury guaranteed by the Seventh Amendment. The question of fact, presented only if the first question be answered in the affirmative, is whether this case is too complicated for a jury to understand. But under 28 U. S. C. § 1292(b), review of factual matters cannot be obtained, but only of controlling "questions of law." (*Link* v. *Mercedes-Benz of North America, Inc.*, 550 F. 2d 860, 863 (C. A. 3, 1977), cert. den. 431 U. S. 933.)

The only legal question presented by the Court of Appeals decision is whether there is a "complexity" exception to the right of trial by jury guaranteed by the Seventh Amendment. If this question be answered in the negative, as the Court of Appeals held, then the question of how "complex" a case must be before a right to a trial by jury is lost is never reached.

Similarly, in this case, the Court of Appeals never had to reach the factual issue—assuming it was before it—and this Court cannot determine from a record certified by the Court of

Appeals whether this case is in fact so complicated that a jury cannot comprehend it.

Hence, IBM in effect is asking this Court to render an advisory opinion, or decide an abstract question because while a negative answer as to whether there is a "complexity exception" would determine that Greyhound has a right to a jury trial, an affirmative answer would not determine that it was not. Whether this case is too complicated for a jury to understand would be for the District Court to decide in the first instance, subject to further review by the Court of Appeals and by this Court.

3.

The Petition Should Be Denied Also Because the Decision of the Court of Appeals Was Correct and Is Not in Conflict with Decisions of any Other Court of Appeals or of This Court.

IBM asserts that the ninth circuit refused to follow the test for a jury trial set forth in *Ross* v. *Bernhard,* 396 U. S. 531 (1970) where, in a footnote, this Court said "as our cases indicate, the 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries." (p. 538, footnote 10)

IBM contends that this footnote is authority for reexamining the right to jury trial in a complex treble damage antitrust case in light of "the practical abilities and limitations of juries." This interpretation misstates the meaning of the *Ross* footnote and inaccurately portrays the holding of the case.

Although IBM places heavy reliance on the footnote, it fails to inform this Court that the *text* annotated by this footnote reaffirms that "there is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of common

issues existing between the claims." (p. 538) In addition, the footnote applies, not to determining whether cases are tried to juries, but to the prospective determination of whether newly created *causes of action* are legal or equitable. Thus, the footnote refers to determining "the 'legal' nature of an issue * * *." (p. 538, n. 10) Unfortunately for IBM, the "legal" nature of an antitrust treble damage claim has already been determined by this Court. *Ross* does not suggest that this determination be reexamined. Indeed, *Ross* reaffirms it.

This Court in *Ross* relied on the holding in *Fleitmann* v. *Welsbach Street Lighting Co.*, 240 U. S. (1916) that treble damage antitrust suits *must* be tried to a jury. It stated (p. 535):

> "[Mr. Justice Holmes] concluded that when the penalty of triple damages is sought, the antitrust statute plainly anticipated a jury trial and should not be read as 'attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law.'"

Thus, *Ross*, the case on which IBM most heavily relies, is actually contrary to its position.*

The importance of third part of the *Ross* footnote was also undercut by the decision of this Court in *Curtis* v. *Loether*, 415 U. S. 189 (1974). In *Curtis*, this Court held that the Seventh Amendment guaranteed the right of jury trial in cases arising under the fair housing provisions of the Civil Rights Act of 1968. The standard announced in *Curtis* did not include a consideration of the practical limitations of juries. This Court said (p. 194):

> "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if

* In the *Financial Securities* litigation, it was contended that because of the complicated accounting and financial problems presented the action was "analogous to an action for an equitable accounting where historically there has been no right to a jury." (609 F. 2d at p. 423). Even IBM does not seriously contend that equity ever entertained jurisdiction because treble damages, in the nature of a penalty, were recoverable by statute.

> the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law."

Although the *Ross* case was decided in 1970, it was not until 1976 that a district court, for the first time, interpreted the footnote as making a complexity exception to the right to trial by jury guaranteed by the Seventh Amendment, *In re Boise Cascade Securities Litigation*, 420 F. Supp. 99 (D. C. Wash., 1976). No court of appeals has ever made such a holding, IBM's petition to the contrary notwithstanding.

At page 12, IBM cites five Court of Appeals opinions and states that they conflict with the ninth circuit's holding. *In each of the cited cases, the court held there was a right to jury trial although some of the cases* by way of dicta, interpret the *Ross* dicta as making a complexity exception to the right of trial by jury under the Seventh Amendment.

In view of the scholarly opinion of the Court of Appeals in the ninth circuit in *In re U. S. Financial Securities Litigation*, it seems superfluous to add anything further to what that court said. That court reviewed prior holdings of this Court, including such well known decisions as *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469; *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959). It stated at page 425:

> "After employing a historical test for almost 200 years, it is doubful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote."

4.

The Petition Should Be Denied Because This Case Is Not in Fact so Extraordinarily Complex as to Exceed the Practical Abilities and Limitations of a Jury.

The District Court characterized this case as a "complex one," and stated that a non-jury trial would be shorter and would avoid the possibility of a hung jury. The latter two comments

could also properly apply to an action involving an intersection collision where both parties claimed they had the green light. With respect to the first ground, "complexity," of itself, can never operate to deny a jury trial as apparently even IBM concedes.

It has been ten years since the *Ross* case has been decided and uncounted numbers of "complex cases," including antitrust treble damage actions, have been tried before juries without anyone ever claiming that "complexity" operated to deny the right to a jury trial. And, of course, the *Manual for Complex Litigation* recognizes that complex cases will often be tried by juries. See, *e.g., Manual of Complex Litigation,* §§ 4.12, 4.40, 4.401, 4.41.

"Complex" cases will vary greatly with respect to the degree of complexity involved. How "complex" does a case have to be before a jury trial is lost? IBM's petition does not tell us except as it says it is lost if it is so "extraordinarily complex" as to exceed the "practical abilities and limitations of a jury." If this is a proper test, how is it to be applied? How does a Court determine this question? What degree of intelligence is to be ascribed to the jury? Jurors, like the population generally, will range from the most uncomprehending to the most understanding. These, and a host of other questions, suggest themselves. IBM is contending for a rule that would be impossible to administer and would lead to endless appeals directed to the question whether there was a right to a jury trial, particularly in an antitrust treble damage action.

In the instant case this Court cannot determine whether it is "so extraordinarily" complex "as to exceed the practical abilities and limitations of a jury" by granting a writ of certiorari to the ninth circuit. This is because the record in that court is so limited that it can throw no light on this question. Although this action involves an esoteric product—computers—the legal and factual issues involved are not much different from a "nuts

and bolts" case. This case is a comparatively simple antitrust action as the opinion of the ninth circuit on the first appeal reveals. It is an action by a single plaintiff against a single defendant under only one section of the antitrust laws. The claimed monopolistic nature of IBM's practices are not difficult to understand. If the case set out in the Court of Appeals opinion at 559 F. 2d 488, is too complicated for a jury to understand, then no antitrust treble damage action is triable to a jury.

CONCLUSION

IBM's petition for writ of certiorari should be denied.

Respectfully submitted,

EDWARD L. FOOTE
EDWARD J. WENDROW
One First National Plaza
Chicago, Illinois 60603
Counsel for Respondent, Greyhound Computer Corporation

Of Counsel:
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603

Supreme Court, U.S.
FILED
APR 9 1980
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-1396
No. 79-1397

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,
v.
GREYHOUND COMPUTER CORPORATION,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF INTERNATIONAL BUSINESS MACHINES CORPORATION

Of Counsel:

NICHOLAS DEB. KATZENBACH
International Business Machines Corporation
Armonk, New York 10504

BROWN & BAIN
222 N. Central Avenue
Phoenix, Arizona 85004

THOMAS D. BARR
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005

JAMES S. CAMPBELL
ALAN N. BRAVERMAN
ANDREW N. VOLLMER
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner International Business Machines Corporation

April 9, 1980

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1396
No. 79-1397

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Petitioner,

v.

GREYHOUND COMPUTER CORPORATION,
Respondent.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF INTERNATIONAL BUSINESS MACHINES CORPORATION

In its petition, IBM stated that the trial of this case was set for May 1, 1980. Since filing the petition, IBM has learned, and wishes to advise the Court, that the trial judge has postponed trial of the case until February 3, 1981. The trial judge's order

is attached as an Appendix. The postponement was ordered because Greyhound's two primary witnesses on the damages issues are not yet prepared "to testify in any meaningful way." Appendix at 1a.

Though urging this Court to refuse a writ of certiorari, Greyhound does not dispute that the Ninth Circuit's decision, requiring a jury trial of this extraordinarily complex case, raises an issue critically important to the administration of justice in the federal courts. Moreover, respondent's discussion of *Ross v. Bernhard*, 396 U.S. 531 (1970), and its progeny only amplifies one of the reasons IBM believes this Court should review the decision below, namely, the confusion and disagreement about the standards to be applied in resolving the Seventh Amendment and Due Process questions raised by a jury demand in an extraordinarily complex case. Instead, respondent seeks to defeat review of the question presented in the petition by resorting to a number of technical quibbles, all of them without any real substance.

1. Greyhound urges that the legal issue presented by IBM's petition requires resolution of a factual issue not reached by the courts below. Greyhound's Brief in Opposition to Petition for Certiorari at 6-7. The premise for this argument is respondent's claim that the district court failed to find that the instant case is so complex as to exceed the practical abilities and limitations of a jury.

In so claiming, Greyhound misreads the clear import of the district court's ruling. That ruling was a response to the parties' opposing contentions as to both the degree of complexity of the case and the appropriate Seventh Amendment and Due Process

standards for deciding IBM's motion to strike the jury. The district court found that the case "is a complex case *by any definition*." IBM's Petition at 2a (emphasis supplied). The court further stated that the trial will require "a minimum of three months" and that there is a "very real danger of a hung jury and a third trial *or more*." *Id.* (emphasis supplied). The court then denied IBM's motion because it believed that under "the current status of the law," *id.*, it was without authority to strike the jury demand, not because it believed the case was within the practical abilities and limitations of a jury.[1]

The question certified by the district court thus was whether it had the authority to strike a jury demand in a case such as *Greyhound*. *See* IBM's Petition at 3a. As respondent apparently concedes, the Ninth Circuit answered that question in the negative, reaffirming its newly-announced rule in *U.S. Financial* that there is no "complexity exception" to the right to jury trial under the Seventh Amendment. Greyhound's Brief in Opposition at 4, 6. The question of law raised by the petition is, therefore, squarely presented to this Court.

2. Respondent's contention that the Court will not have a record before it sufficient to confirm the complexity of this case is also wrong. *See* Greyhound's Brief in Opposition at 6-7, 10; Greyhound's Brief in Opposition to Conditional Motion at 3. Upon the granting of a petition for certiorari, the clerk of this Court requests the record in the case from "the clerk

---

[1] The court would not have reached the constitutional questions if it believed a jury would be able to understand the case. *See Rescue Army v. Municipal Court*, 331 U.S. 549, 568-69 (1947).

of the court possessed of" it. Rules of the Supreme Court 25(2). The court possessing the record most fully demonstrating the complexity of this case is the district court, which has the complete record of the first trial and the post-remand pretrial proceedings.[2] If the petition is granted, the clerk presumably would request the record from this court.[3] This record illuminates the district court's finding of extraordinary complexity in a lawsuit whose complexity is instructively different from *Gant v. Union Bank*, No. 79-1383. *See* IBM's Petition at 13-15.[4]

---

[2] The record of the prior trial contains, for example, the opening statement to the jury by Greyhound's counsel:

> [T]his is such a complicated case to present—sometimes I wonder whether I understand the case, and I'm trying to present it to you on behalf of Greyhound . . . .

Transcript, vol. 1, at 13 (May 23, 1972), *Greyhound Computer Corp. v. IBM Corp.*, No. Civ. 72-242-PHX-WPC (D. Ariz.).

[3] Of course, if the Court deems it appropriate, it can direct the writ of certiorari to the district court pursuant to 28 U.S.C. § 1651(a). *See* IBM's Conditional Motion for Leave to File Petition and Petition for Writ of Certiorari at 4. IBM's conditional application for such a writ is not untimely under 28 U.S.C. § 2101(c), contrary to Greyhound's mistaken assertion. *See* Greyhound's Brief in Opposition to Conditional Motion at 3-4. There are no time limitations on applying for an extraordinary writ under section 1651(a). *See* Rules of the Supreme Court 31; R. Stern & E. Gressman, *Supreme Court Practice* 388 (5th ed. 1978). Even if section 2101(c) did govern IBM's conditional application, the time period under that section may be enlarged up to 150 days; here, IBM's petition was filed 125 days after the district court's decision.

[4] IBM's amicus brief in *Gant* answers Greyhound's claim that workable standards for identifying extraordinarily complex cases cannot be enunciated. *See* Motion of International Business Machines Corporation for Leave to File As Amicus Curiae In Support of Petition for Writ of Certiorari and Brief of Amicus Curiae at 14-16, *Gant v. Union Bank*, No. 79-1383.

3. Without citing any authority and without claiming any prejudice, *see United States v. L.D.T. Corp.*, 302 F. Supp. 990, 991 (E.D. Pa. 1969), Greyhound asserts that IBM has waived its right to contend that this case is too complicated for a jury. Greyhound's Brief in Opposition at 4-5. The basis for this assertion is that IBM waited until the re-trial of the case was near before moving to strike the jury, though a complaint demanding a jury trial had been outstanding for ten years. *Id.* at 2, 4-5.

The previous trial of this case took place in 1972 and ended in a directed verdict for IBM.[5] Greyhound's appeal was pending in the Ninth Circuit from 1972 to 1977, and IBM's petition for certiorari was denied by this Court in January of 1978. IBM moved in September of 1979 to strike Greyhound's jury demand under Fed. R. Civ. P. 39(a)(2). That Rule sets no time limits for such a motion. District courts have discretion to strike a jury demand at any time before trial, *id.*, and prefer to do so when the trial is approaching and the issues to be tried and the relief requested have been better defined. *See, e.g., General Investment Co. of Connecticut, Inc. v. Ackerman*, 37 F.R.D. 38, 40 (S.D.N.Y. 1964). In

---

[5] *Greyhound v. IBM* was the first trial of the numerous private antitrust actions brought against IBM in the wake of the government's similar antitrust case. It was not until 1977 and 1978 that IBM had three protracted antitrust trials against it end with hung juries. *See* IBM's Petition at 5 n.3.

reaching the merits of IBM's motion, the district court was unswayed by Greyhound's waiver argument which, as here, was supported neither by a claim of prejudice nor by any authority.

Respectfully submitted,

Of Counsel:

NICHOLAS DEB. KATZENBACH
International Business
Machines Corporation
Armonk, New York 10504

BROWN & BAIN
222 N. Central Avenue
Phoenix, Arizona 85004

THOMAS D. BARR
CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, New York 10005

JAMES S. CAMPBELL
ALAN N. BRAVERMAN
ANDREW N. VOLLMER
WILMER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Counsel for Petitioner
International Business
Machines Corporation

April 9, 1980

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. Civ. 72-242 Phx. WPC

GREYHOUND COMPUTER CORPORATION,
Plaintiff,

vs.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Defendant.

ORDER

Magistrate Gormley, after discussions with counsel, has determined that this case is not and cannot be readied for trial commencing May 6, 1980, as scheduled.

This Court has reviewed portions of the deposition of Fred E. Martin taken March 11, 1980, and R. H. Hunsberger taken March 12, 1980. These are plaintiff's primary witnesses on the essential question of damages claimed to have been suffered because of alleged acts of defendant. As to Mr. Martin, it is apparent that his work in many areas has not "progressed beyond the idea stage." He is not prepared at this time to give any meaningful testimony as to his opinion of damages or how he proposes to compute them. A reading of that deposition leaves the Court with the firm conviction that he has done nothing in this crucial area. Mr. Hunsberger appears to be only a short distance ahead of Mr. Martin in his calculations and study. He is also not prepared to testify in any meaningful way.

The Court would estimate that with diligent effort it will be 30-60 days or more before any meaningful examination of these witnesses can be had by defendant. Thereafter defendant will need time for its experts to examine plaintiff's damage estimates and opinions and the records upon which they are based. After that is done counsel for plaintiff will certainly desire to depose defendant's counter-experts. All of this should have been done long ago and must be done prior to preparation of the final pretrial order, pretrial conference and trial. Counsel for plaintiff has requested the earliest possible trial date.

IT IS ORDERED:

1. This Court's order filed herein on January 17, 1980, is quashed.

2. Trial herein scheduled to commence May 6, 1980, is vacated.

3. This case is placed on the Court's calendar of cases deferred for trial.

IT IS FURTHER ORDERED:

1. This case is referred to Magistrate Gormley for the following purposes, in addition to hearing and determining discovery disputes:

(a) Establish, in conference with chief counsel for each side, a realistic schedule for completing *all* pretrial discovery and determination of a final cut-off date.

(b) Establish a time for completion and lodging with the Magistrate a final pretrial order in compliance with Local Rule 42C.

(c) The holding of preliminary pretrial conferences and a final pretrial conference in accordance with Local Rule 42D.

(d) Schedule and procedure for marking exhibits to be offered at trial either directly into evidence or for identification only, as may be appropriate.

(e) Such other matters as may arise prior to the Magistrate's approval of the proposed pretrial order as he may be authorized by law or Local Rule to hear and determine or recommend such determination to the Court.

IT IS FURTHER ORDERED:

1. Jury trial herein is rescheduled to commence at 9:30 A.M., Tuesday, February 3, 1981.

2. Not later than thirty (30) days prior to trial counsel will

(a) Exchange and file with the Court requested jury voir dire questions.

(b) Exchange and lodge with the Court their then proposed jury instructions.

(c) Exchange and file with the Court trial briefs on issues of law as set forth in the pretrial order or otherwise likely to arise at trial.

DATED March 20, 1980.

/s/ Wm. P. Copple
United States District Judge

see

79

1397